COA No. 47733-5-II
Cowlitz County Superior Court No. 09-1-00735-4

IN THE COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

---

In re the Personal Restraint of

Fred Durgeloh,

Petitioner

---

# REPLY BRIEF OF PETITIONER

---

Emily M. Gause
Attorney for Petitioner
Law Offices of Emily M. Gause PLLC
1001 Fourth Avenue North, Suite 4400
Seattle, Washington 98154
Tel 206-660-8775 ♦ Fax 206-389-1708

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

### United States Supreme Court



### Washington State Supreme Court

**Washington State Court of Appeals**



**Federal Court**



**Statutes**

## I. ARGUMENT IN REPLY

### 1. TRIAL COUNSEL FAILED TO CONDUCT AN INDEPENDENT AND TIMELY INVESTIGATION, WHICH SHOULD HAVE INCLUDED HIRING A MENTAL HEALTH EXPERT BEFORE TRIAL, DESPITE MR. DURGELOH'S OBVIOUS MENTAL AND PHYSICAL CONDITIONS. THESE FAILURES DEPRIVED MR. DURGELOH OF THE RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL.

#### a. Deficient Performance

Mr. Durgeloh's trial counsel knew that diminished capacity was a factor in this case and failed to meaningfully investigate this viable defense or timely retain a defense expert to evaluate Mr. Durgeloh's well-known mental health issues. Washington law is abundantly clear that this representation was deficient.[1]

Hiring a qualified defense expert prior to trial is essential for defense counsel to be adequately prepared, properly investigate mental health issues, and fully evaluate possible defenses. Failure of defense counsel to present a diminished capacity defense where the facts support such defense satisfies both prongs of the Strickland test.[2] When it appears probable that

---

[1] *See* State v. Brett, 142 Wn.2d 868, 876, 16 P.3d 601 (2001)(When defense counsel knows or has reason to know of a defendant's medical and mental problems that are relevant to making an informed defense theory, defense counsel has a duty to conduct a reasonable investigation into the defendant's medical and mental health, have such problems fully assessed and, if necessary, retain qualified experts to testify accordingly); State v. Tilton, 149 Wn.2d 775, 72 P.3d 735 (2003); State v. Thomas, 109 Wn.2d 222, 226, 743 P.2d 816 (1987); In re Yates, 177 Wn.2d 1, 40, 296 P.3d 872 (2013)(counsel not ineffective because counsel retained defense experts to explore mental health defenses); State v. Jones, 85236-7, 2015 WL 3646445 (Wash. June 11, 2015).

[2] Thomas, at 226.

the defense should have been presented, and that a reasonably competent attorney would have raised it, "confidence in the outcome of the trial is certainly compromised."[3]

"Trial counsel's duty is to *retain* qualified experts and provide those experts with relevant information."[4] Further, counsel has a "professional responsibility to investigate and bring to the attention of mental health experts ... facts that the experts do not request."[5] Without retaining experts in the course of a reasonable investigation, "counsel is unable to make informed decisions about how to best represent" his client.[6]

Mr. Durgeloh's case is markedly different than the case cited by the state, State v. Harper.[7] In Harper, trial counsel actually *retained a defense expert* to evaluate the defendant for diminished capacity.[8] This Court focused on that fact, and then held that counsel was not required to continue consulting additional defense experts.[9] In this case, however, counsel did not consult *any* expert. Instead, counsel relied on the state's expert, an evaluation at Western State that occurred more than one year after the

---

[3] State v. Tilton, 149 Wn.2d 775, 785, 72 P.3d 735 (2003).
[4] In re Yates, 177 Wn.2d 1, 40, 296 P.3d 872 (2013) (counsel not ineffective because counsel retained defense experts to explore mental health defenses), citing In re Pres. Restraint of Davis, 152 Wn.2d, 647,733, 101 P.3d 1 (2004) (emphasis added).
[5] Wallace v. Stewart, 184 F.3d 1112, 1116 (9th Cir.1999)
[6] Brett, 142 Wn.2d at 883.
[7] State v. Harper, 64 Wn. App. 283, 823 P.2d 1137 (1992).
[8] Id. at 287.
[9] Id. at 290.

incident.[10] That evaluation was incomplete and deficient; defense counsel did not assist in the evaluation nor provide any information to the evaluator.

Although the Harper Court found trial counsel made a tactical decision because there was no other defense, Mr. Durgeloh's trial counsel failed to meaningfully investigate whether diminished capacity was a defense because he never obtained a defense expert. And, in fact, it *was* a viable defense.[11] While defense counsel is not required to continue seeking experts until he finds one willing to give an opinion supporting diminished capacity,[12] defense counsel *is* required to investigate and retain an expert when he knows that diminished capacity is a possible defense.

This is case is more analogous to State v. Fedoruk.[13] In that case, this Court held that an attorney's failure to adequately investigate possible defenses constitutes deficient performance.[14] As the state argues here, the state in Fedoruk emphasized that the record was not clear about what investigation trial counsel may have conducted into a diminished capacity defense.[15] However, just as here, the defendant's extensive mental health history was available to defense from the beginning of the case and defense

---

[10] The incident occurred on July 11, 2009. The Western State Hospital evaluation by Mr. Morrison happened on September 27, 2010, over one year after the offense.
[11] CP 99-104.
[12] State's brief, page 10; State v. Harper at 290.
[13] State v. Fedoruk, 184 Wn. App. 866, 339 P.3d 233 (2014).
[14] Id. at 883.
[15] Id. at 881.

counsel's failure to timely retain a defense expert to evaluate such history fell below a standard of reasonableness.[16] Without a thorough defense evaluation, trial counsel "cannot make an informed opinion" about the consequences of going to trial on a theory of general denial versus diminished capacity.[17] Counsel must first retain a defense expert regarding the defendant's mental state at the time of the offense.[18] The Fedoruk court also emphasized that such evaluation must be *timely*.[19] Here, Mr. Durgeloh's trial counsel never sought an expert prior to trial. Instead, he only sought a defense evaluation *after* trial and prior to sentencing. This is deficient, unreasonable, untimely, and constitutes gross ineffective assistance of counsel.

Defense counsel was well aware of the potential diminished capacity from the inception of representation. Officers were called to Mr. Durgeloh's house to perform a "welfare check" because Mr. Durgeloh's mental state had deteriorated. By September 29, 2009, just a little over two months after the incident, the state asked the court for an evaluation because "there is reason to doubt [Mr. Durgeloh's] capacity."[20] Trial counsel should

---

[16] Id. at 881-82.
[17] Id. at 882.
[18] Id.
[19] Id. at 883.
[20] CP 12.

have known a testifying expert is required to present a mental health defense at trial.[21] Yet, counsel never retained such expert.

When counsel makes a decision not to further investigate, that decision is only reasonable to the extent professional judgment makes the limitations placed on further reasonable in the circumstances.[22] It was not reasonable strategy that led Mr. Durgeloh's counsel not to retain a defense expert to evaluate known mental health issues. Instead, it was lack of thoroughness and preparation.[23] This is especially true when counsel relies on an incomplete state evaluation.[24]

In its brief the state also incorrectly states that Mr. Durgeloh's trial attorney pursued a "general denial" defense.[25] Mr. Durgeloh's never claimed he was absent from the house, that did not make the statements, that he did not have a gun, nor did he deny that he acted the way the officers described.[26] Instead, his argument was that he *lacked intent* to cause fear in

---

[21] State v. Edmon, 28 Wn. App. 98, 02, 621 P.2d 1310 (1981).
[22] Strickland v. Washington, 466 U.S. 668, 690-81, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).
[23] *See* Kenley v. Armontrout, 937 F.2d 1298, 1305-06 (8th Cir. 1991) (finding counsel ineffective for not fully investigating mental health issues and mitigating evidence based on lack of thoroughness and preparation rather than reasonable strategy); See also United States v. Gray, 878 F.2d 702, 712 (3d Cir. 1989) ("counsel's behavior [not to investigate] was not colorably based on tactical considerations but merely upon a lack of diligence").
[24] *See* Kenley v. Armontrout, supra, 1305-06 (ineffective to rely on inconclusive and incomplete psychological report as basis to forego further investigation.)
[25] State's Response, page 11.
[26] RP 240-247

the victims. A defense evaluation into diminished capacity, even if not rising to a full diminished capacity defense, would have assist the trier of fact in evaluating Mr. Durgeloh's lack of intent at the time of the offense. The two theories were consistent in nature, not contradictory or opposing.[27] Thus, counsel's failure to investigate and retain a defense expert cannot be said to be a tactical or strategic decision.

**b. Prejudice**

Many Washington cases have been reversed for failure to investigate a possible mental health defense *without* a subsequent expert report confirming the viability of such mental health defense.[28] In Mr. Durgeloh's case, he has unequivocally shown prejudice because a subsequent mental health evaluation prior to sentencing concluded that he lacked the ability to form intent during the crime.[29]

Mr. Durgeloh has demonstrated that he was prejudiced by trial counsel's deficient performance by showing a probability of a more favorable result "sufficient to undermine confidence in the outcome" actually obtained. Fedoruk, at 884, citing Strickland v. Washington, 466

---

[27] *See* In re Woods, 154 Wn.2d 400, 421, 114 P.3d 607 (2005) (reasonable for attorneys to choose alibi defense over pursuing a diminished capacity defense, was a tactical decision because Woods continually denied his involvement in the crimes).
[28] *See* State v. Fedoruk, supra, at 241;
[29] CP 99-104.

U.S. 668, 693-94, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). In Fedoruk, the State argued that defendant could not show prejudice because "he cites to nothing in the record showing that any expert would be able to testify that he was legally insane or lacked the capacity to form the necessary intent." Id. The Court rejected that argument.

Here, after Mr. Durgeloh was actually evaluated *after* trial, a defense expert opined that Mr. Durgeloh had "no intention of harming others," and "his behavior was the direct result of mental illness."[30] The Fedoruk Court found that even without any evidence in the record that an expert would have concluded diminished capacity was a viable defense, evidence of significant mental health issues coupled with bizarre actions on the night of the offense was enough to show a reasonable likelihood that the outcome of trial would have differed had Fedoruk been able to present a diminished capacity defense. Id. at 885. The same is true here.

Because Mr. Durgeloh received ineffective assistance of counsel, this Court should reverse and remand for a new trial.

[30] CP 102.

## 2. TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO PROVIDE ANY LEGAL AUTHORITY OR MAKE A MEANINGFUL ARGUMENT FOR AN EXCEPTIONAL SENTENCE

Trial counsel was ineffective at sentencing when he did not provide a legal basis for requesting an exceptional sentence, failed to correct the state's assertions that "there is no basis for an exceptional sentence,"[31] and did not even correctly cite the appropriate mitigating factor that applied to Mr. Durgeloh's case.[32] RCW 9.94A.535(1)(e) is directly applicable to the facts in Mr. Durgeloh's case. This mitigating factor allows a court to impose an exceptional sentence when defendant's "capacity to appreciate the wrongfulness of his conduct or to confirm his conduct to the requirements of the law was significantly impaired." The record reflects that trial counsel completely failed to argue for an exceptional sentence, both by failure to file a written sentencing memorandum and also by failing to make any meaningful argument at sentencing. Counsel did not reference the statute, nor use the language contained within the statute that would qualify Mr. Durgeloh for an exceptional sentence.

---

[31] RP 386 ("Your honor, I would submit to this Court that there is *no basis for an exceptional sentence*. The exceptional sentence statutes talk about exceptional factors that relate to the crime, not to the condition of the defendant, be it medical concerns, personal situations, things of the like. I think we all have a certain degree of empathy for Mr. Durgeloh, but *in the law's eyes those are not considered mitigating circumstances.*") (emphasis added).

[32] "My opinion and position is that those reports, particularly Dr. Larson's, would support a mitigating factor of – and for an exceptional down sentence." RP 383.

Filing a mental health report, without reference to the contents or conclusion in that report, without arguing how such report demonstrates that Mr. Durgeloh is eligible for an exceptional sentence, and without referring to the statute or any case law is abominable. This is especially true given the particular facts of Mr. Durgeloh's case: that the offenses came from a "welfare check" because Mr. Durgeloh's mental health issues had gotten out of control; that his defense counsel had an expert report clearly stating that Mr. Durgeloh lacked intention to harm others and "it is obvious, with reasonable medical certainty, that his behavior was the direct result of mental illness;"[33] and that without an exceptional sentence, Mr. Durgeloh would be facing nearly 10 years, the statutory maximum, for his first felony convictions.

While mental conditions not amounting to diminished capacity may constitute mitigating factors supporting an exceptional sentence below the standard range, the record must establish not only the existence of the mental condition, but also the requisite connections between the condition and the significant impairment of the defendant's ability to appreciate the wrongfulness of his conduct or to conform his conduct the requirement of the law.[34] Although Mr. Durgeloh's attorney filed a mental health report

---

[33] CP 102.

[34] State v. Schloredt, 97 Wn. App. 789, 802, 987 P.2d 647 (1999).

that made the proper record for the Court to impose an exceptional sentence, the attorney was ineffective for failing to meaningfully argue that the court should impose such sentence, or provide any authority for doing so.

In a first degree rape of a child case, State v. Smith, the Court exercised its discretion and imposed six months of jail, an exceptional sentence well-below the standard range of 93-163 months.[35] The Court did so because the defendant's developmental delay was a mitigating factor tending to show that the defendant's capacity to appreciate the wrongfulness of his conduct was significantly impaired. Id. That sentence was upheld on appeal.

In State v. Bernhard,[36] an exceptional sentence of 12-months of inpatient drug treatment was upheld when the Court found that the defendant's criminal behavior directly resulted from his addictions to drugs and alcohol. A trial court can consider whether or not a causal connection exists between the defendant's addiction and his criminal act, and whether that is a substantial and compelling reason to justify an exceptional sentence.[37]

---

[35] State v. Smith, 139 Wn. App. 600, 601, 161 P.3d 483 (2007).

[36] State v. Bernhard, 108 Wn.2d 527, 741 P.2d 1 (1987).

[37] Id. at 761.

In deciding whether to impose an exceptional sentence below the standard range, a sentencing court may consider the fact that defendant not only has a zero offender score, but a complete absence of prior police contacts.[38] Although the "lack of predisposition" to commit a crime alone is not a substantial and compelling reason for a court to impose an exceptional sentence below the range, it is relevant to consider if there is another factor tending to show that the defendant was "induced" to commit the crime.[39]

Had the trial court been provided any of the above-mentioned authority, or even just the specific language in the statute providing authority for an exceptional sentence below the standard range, the result could have been different. Mr. Durgeloh was prejudiced by his counsel's deficient performance because the court *could have* imposed an exceptional sentence had it been provided with statutory authority and argument that there was a legal basis for doing so.[40]

The record is clear that the only person who made any meaningful argument tying Dr. Larson's report to Mr. Durgeloh capacity to form intent to commit the offenses was Mr. Durgeloh's caretaker, Sandy Udon, who

---

[38] State v. Baucham, 76 Wn. App. 749, 887 P.2d 909 (1995).
[39] State v. Ha'mim, 132 Wn.2d 834, 843, 940 P.2d 633, 637 (1997).
[40] *See* State v. McGill, 112 Wn. App. 95, 101, 47 P.3d 173 (2002) (defendant was prejudice by his counsel's failure to argue for a downward departure when it *could have* resulted in a lower sentence.)

spoke at sentencing.[41] Mr. Durgeloh's attorney did not even link the report to the offense conduct in any meaningful way. In fact, counsel appears to argue *against* Dr. Larson's report by saying "we did not offer this in the form of a diminished capacity or mental defense."[42] But, that is exactly what the report concludes: that Mr. Durgeloh's capacity to appreciate the wrongfulness of his conduct was significantly impaired. And, that is exactly what the Court needed to find in order to impose an exceptional sentence. There is no rational or strategic explanation for trial counsel's deficient performance.

Because of this failure, the trial judge did not once mention Dr. Larson's report when imposing the sentence, and only briefly mentioned the fact that Mr. Durgeloh was weaning off medications when the offense occurred.[43] He did not mention the phrase "exceptional sentence" nor make a finding of why an exceptional sentence was not appropriate. It appears from the record that the judge did *not* consider imposition of an exception sentence after the state claimed there was "no basis for an exceptional sentence" and asserted that "in the law's eyes, those are not considered

---

[41] "If you'll read what Dr. Larson said, he felt that was actually a circumstance that should weigh heavily on the legal decision that's made…" RP 395-96

[42] RP 389.

[43] RP 402. "I'm imposing the low end of the range, I think in recognition of the fact of the impact of the waning off of the drugs that probably – or the medications, pardon me, the medications had on Mr. Durgeloh."

mitigating circumstances."[44] Under State v. McGill, this sentence must be reversed and remanded.[45]

### 3. TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO ARGUE THAT MR. DURGELOH'S CONVICTIONS ARE THE SAME CRIMINAL CONDUCT

#### a. Merger

Merger is a doctrine of statutory interpretation used to determine whether the legislature intended to impose multiple punishments for a single act that violates several statutory provisions.[46] Courts apply the merger doctrine on a case-by-case basis turning on whether the predicate and charged crimes are sufficiently "intertwined" for merger to apply.[47] State and Federal constitutional protections against double jeopardy prohibit multiple punishments for the same offense.[48] When the particular degree of a crime requires proof that the crime was accompanied by an act defined elsewhere in the criminal statutes as a crime, it is presumed the legislature intended to punish both offenses through a greater sentence for the greater crime.[49] Id. at 461. The merger doctrine prevents "pyramiding the charges" and turns on whether the crimes are sufficiently intertwined.[50] If an offense

---

[44] RP 386.
[45] State v. McGill, 112 Wn. App. 95, 98-99, 47 P.3d 173, 175 (2002).
[46] State v. Davis, 177 Wn. App. 454, 460, 311 P.3d 1278 (2013).
[47] State v. Johnson, 92 Wn.2d 671, 681, 677 P.2d 202 (1984).
[48] Davis, at 460.
[49] Davis at 461.
[50] Johnson, at 676-81.

is vacated under the merger doctrine, an associated firearms enhancement must be vacated as well.[51]

Mr. Durgeloh's trial counsel briefly raised the possibility of merger at sentencing.[52] The state summarily dismissed defense counsel, stating "merger under a double jeopardy theory does not apply because the elements are different and very much the same fashion."[53] Defense counsel quickly aborted that argument and did not provide any authority for the court to consider.

Mr. Durgeloh was convicted of assault in the second degree, for intending to create apprehension of fear of bodily injury with a deadly weapon.[54] He was also convicted of felony harassment, for knowingly threatening to cause bodily injury, and using words or conduct that places the person threatened in reasonable fear that the threat will be carried out.[55] To elevate from a misdemeanor to felony harassment, the state had to prove that Mr. Durgeloh made a threat to kill the victims.[56]

Without the assault in the second degree, based on Mr. Durgeloh pointing a gun in the general direction of where Deputy Moore and Sgt.

---

[51] RCW 9.94A.533.
[52] RP 398 ("one of the questions we're going to have to determine is whether or not any of the felony harassments merge with the assault two.")
[53] RP 399.
[54] RCW 9A.36.021.
[55] RCW 9A.46.020
[56] Id.

Cruser were standing, there would not be sufficient evidence for felony harassment, that Mr. Durgeloh knowingly threatened to cause bodily injury to the victims that caused a *reasonable fear that the threat will be carried out.* The threat of bodily injury was coupled and intertwined with his statements and actions regarding the assault charge. Therefore, authority makes it clear that Mr. Durgeloh's convictions should merge.

In Davis, the Court held that two counts of assault in the second degree assault merged with convictions for second-degree kidnapping.[57] The state in that case, just as here, argued that merger did not apply because the proving kidnapping in the second degree did not require proof of assault in the second degree. The court rejected that argument, as this Court should follow, because the same acts constituting one crime applied to the second crime.[58] Courts must focus on the manner in which offenses are charged and proved in a particular case and ask whether the state was required to prove the act constituting the merging crime to elevate the other crime.[59]

Here, the state could not prove felony harassment – that is a threat to kill that *placed the officers threatened in reasonable fear that the threat will be carried out* – without proving that Mr. Durgeloh had intended to

---

[57] Davis, supra, at 461.
[58] Id. at 464.
[59] Id. at 463.

create apprehension of fear of bodily injury with a deadly weapon. Just as in Johnson, these two acts are "sufficiently intertwined" to be merged. There was not an independent purpose or effect for each crime.

In State v. Leming, this court found that felony harassment merged with assault in the second degree.[60] The court held that the state relied on the same facts for both crimes, a threat to harm the victim and the victim's fear that the threat would be carried out.[61] Under the same evidence test, the convictions were the same in fact and in law.[62] Double jeopardy is violated when "the evidence required to support a conviction upon one of the [charged crimes] would have been sufficient to warrant a conviction upon the other.")[63]

Counsel was deficient for failing to meaningfully raise this argument. Given the fact that merging the felony harassment convictions with the assault two convictions could vacated two firearm enhancements and greatly reduced the overall sentence imposed, counsel's failure to argue this area of law was prejudicial. The court should reverse and remand for resentencing correctly applying Washington's merger doctrine.

---

[60] State v. Leming, 133 Wn. App. 875, 138 P.3d 1095 (2006).
[61] Id. at 889.
[62] *See, e.g.* State v. Freeman, 153 Wn.2d, 765, 777, 108 P.3d 753 (2004) (We do not consider the criminal elements in the abstract to determine whether each statute requires proof of a fact that the other one does not.)
[63] Leming, at 889, citing In re Restraint of Orange, 152 Wn.2d 795, 820, 100 P.3d 291 (2004).

### b. Same Criminal Conduct

"Same criminal conduct" refers to the situation where there are "two or more crimes that (1) require the same criminal intent, (2) are committed at the same time and place, and (3) involve the same victim."[64] the determinative question is whether each crime required the same criminal intent.[65] The Court of Appeals has recognized that "intent" in this context does not mean the *mens rea* required for the crime, but the defendant's "objective criminal purpose in committing the crime."[66] To determine this, courts look objectively at whether one crime furthered the other, or whether there was a substantial change in the nature of the criminal objective.[67]

In State v. Edwards, the court found that kidnapping and assault were the same criminal conduct because they were "intimately related; there was no substantial change in the nature of the criminal objective ... [and] the assault was committed in furtherance of the kidnapping."[68] The same is true here. Mr. Durgeloh's comment constituting felony harassment, "you will die," was intimately related to the criminal objective and intent related

---

[64] State v. Vike, 125 Wn.2d 407, 410, 885 P.2d 824 (1994); RCW 9.94A.589(1)(a).
[65] State v. Saunders, 120 Wn. App. 800, 824, 86 P.3d 232 (2004).
[66] State v. Adame, 56 Wn. App. 803, 811, 785 P.2d 1144 (1990).
[67] State v. Dunaway, 109 Wn.2d 207, 215, 743 P.2d 1237 (1987); State v. Edwards, 45 Wn. App. 378, 382, 725 P.2d 442 (1986) *overruled on other grounds by* Dunaway, 109 Wn.2d at 215, 743 P.2d 1237.
[68] State v. Edwards, 45 Wn. App. 378, 382, 725 P.2d 442 (1986).

to his raising of a gun toward officers on his porch. These were not two separate, distinct acts allowing formation of different criminal intents.

In its response, the state fails to cite any case law in support of its position that Mr. Durgeloh's convictions are not same criminal conduct. Yet, abundant authority supports the argument that Mr. Durgeloh's harassment and assault convictions are same criminal conduct because they occurred in the same place, same time, and toward the same victims.[69] The felony harassment act was not separate and distinct, but was merely incidental to the act of assault in the second degree. Therefore, Mr. Durgeloh's attorney was ineffective for failing to meaningfully argue that the convictions were same criminal conduct and Mr. Durgeloh was prejudiced by such deficient performance.

The state attempts to distinguish the two acts, by claiming that felony harassment includes threats to kill "which could have, in context, occurred immediately or *at some point in the future*."[70] This does not make much sense. The relevant inquiry about same criminal conduct is when the defendant committed the criminal act. Here, Mr. Durgeloh made threatening

---

[69] *See* State v. Edwards, supra, at 382 (kidnapping and assault were same criminal conduct because there was no substantial change to the nature of the criminal objective); State v. Saunders, supra, at 825 (counsel was ineffective for failing to argue same criminal conduct when the motivation for the kidnap was similar to the primary motivation for raping victim); State v. Leming, supra, at 1103 (intent remained constant throughout entire episode).

[70] State's Response, page 17 (emphasis in original).

statements and waved a gun around all within the same time frame, over the course of a couple of hours. There was no separation or lapse of time between these acts. It makes no difference if the threat was to harm a person in the future. That argument does not distinguish same criminal conduct.

The state also makes a creative argument that the assault and felony harassment did not occur at the same time because the standoff lasted two or three hours.[71] Washington law is clear, however, that sequential acts over the course of a few hours may still be same criminal conduct.[72] When a defendant leaves after commission of one crime, followed by a period of reflection, and then forms a new, objective intent for a second crime, that may constitute a sufficient separation in time to make "same criminal conduct" doctrine inapplicable.[73] But, that is not what happened here.

Even though the state may dispute the interpretation of evidence for merger or same criminal conduct, when defense counsel is deficient for failing to meaningfully raise the argument, the failure is prejudicial.[74]

---

[71] State's Response, page 17.

[72] State v. Porter, 133 Wn.2d 133, 182–83, 942 P.2d 974 (1997) (holding that sequential crimes need not be simultaneous to occur at the same time for same criminal conduct purposes); Saunders, at 824 (rape and kidnapping occurred within a limited time period of a few hours).

[73] *See* State v. Wilson, 136 Wn. App. 596, 615, 150 P.3d 144 (2007) (the record is clear that the defendant had separate criminal intents for the two acts, and the two acts were separated in time.)

[74] Saunders, at 825 ("as the case law provides strong support for such argument, the failure is prejudicial.")

Here, defense counsel cursorily mentioned the issue, provided no legal authority, and did not make any meaningful argument that Mr. Durgeloh's convictions are same criminal conduct. The court should remand for a new sentencing hearing.

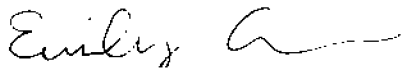
## II. CONCLUSION

For the foregoing reasons, this Court should grant this petition and grant Mr. Durgeloh a new trial, one in which he receives the effective assistance of counsel.

DATED this 21st day of December, 2015

Respectfully submitted,

LAW OFFICES OF EMILY M. GAUSE, PLLC



Emily Gause, WSBA #44446
Attorney for Petitioner

## CERTIFICATE OF SERVICE

Emily M. Gause certifies that opposing counsel was served electronically via the Division II portal and via email:

Tom Ladouceur
Chief Deputy Prosecuting Attorney
Hall of Justice
312 W. First Avenue
Kelso, WA 98626
360-577-3080
Tom.ladouceur@co.cowlitz.wa.us

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

SIGNED this 21st day of December, 2015 in Seattle, WA.

Emily Gause, WSBA #44446

# EMILY GAUSE LAW OFFICE PLLC

## December 21, 2015 - 12:06 PM

**Transmittal Letter**

Document Uploaded: 4-prp2-477335-Reply.pdf

Case Name: In Re the Personal Restraint Petition of Fred Durgeloh
Court of Appeals Case Number: 47733-5

**Is this a Personal Restraint Petition?** ■ Yes No

## The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: ____

Answer/Reply to Motion: ____

Brief: ____

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: ____
Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

■ Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: _____

**Comments:**

No Comments were entered.

Sender Name: Emily M Gause - Email: emily@emilygauselaw.com

A copy of this document has been emailed to the following addresses:

Tom.ladouceur@co.cowlitz.wa.us